NOS. 82-1913 and 82-1951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOE G. GARCIA,

Appellant

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

Appellant

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF AMICI OF THE NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION, 12 OF ITS STATE AFFILIATES, AND THE CITY OF EUGENE, OREGON IN SUPPORT OF APPELLEES

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TABLE OF AUTHORITIES

Constitution and Statutes:

Miscellaneous:

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INTEREST AND DESCRIPTION OF AMICI CURIAE

This Brief *Amici Curiae* in support of Appellees is submitted on behalf of the National Public Employer Labor

Relations Association (NPELRA); 12 of the state affiliates of NPELRA;[1] and the City of Eugene, Oregon.[2]

The National Public Employer Labor Relations Association (NPELRA) is a national organization composed of more than 1,250 members who are predominantly full-time city, county, and state government professionals charged with the responsibility for implementing the employment and labor relations policies affecting over four million public employees. NPELRA members reside in all 50 states and are employed by jurisdictions with as few as 25 employees and as many as 200,000 employees.

The 12 state affiliates of NPELRA are separately incorporated organizations whose memberships are composed of individuals who are either NPELRA members or eligible for NPELRA membership. Whereas the focus of NPELRA is national in scope, the focus of the state affiliates is on issues germane to the jurisdiction in question.

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[1] California Public Employer Labor Relations Association, Connecticut Public Employer Labor Relations Association, Florida Public Employer Labor Relations Association, Illinois Public Employer Labor Relations Association, Indiana Public Employer Labor Relations Association, Iowa Public Employer Labor Relations Association, Michigan Public Employer Labor Relations Association, Minnesota Public Employer Labor Relations Association, New York State Public Employer Labor Relations Association, Ohio Public Employer Labor Relations Association, Rocky Mountain Public Employer Labor Relations Association, and Washington Council of Public Personnel Administrators.

[2] Letters from counsel for all parties, consenting to the filing of this brief on behalf of NPELRA and its state affiliates, are being filed with the Clerk. The Brief on behalf of the City of Eugene, Oregon is being filed pursuant to Rule 36(4) of the Rules of Practice of the Supreme Court of the United States which provides that "[c]onsent to the filing of a brief of an *amicus curiae* need not be had when the brief is presented ... for a political subdivision of a State ... sponsored by the authorized law officer thereof." The authorized law officer of the City of Eugene, Oregon, Timothy Sercombe, is a signatory to this brief.

The City of Eugene, Oregon, the second largest in Oregon with a population of 110,000, has approximately 1,100 employees who provide integral governmental services. The terms and conditions of employment, including the normal workweek and eligibility for overtime pay and/or compensatory time off, for virtually all of the City's non-supervisory, non-professional employees, including its police officers and fire fighters, are established by collective bargaining with the exclusive bargaining representatives for said employees.

NPELRA, 12 of its state affiliates, and the City of Eugene, Oregon, as *Amici Curiae* herein, are especially concerned about any reconsideration of the principles of Tenth Amendment immunity from direct federal regulation of integral governmental functions enunciated by the Supreme Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976). If *National League of Cities* were to be overturned, it would have a direct and immediate impact on the minimum wage and overtime provisions which *Amici* are responsible for administering. The *Amici Curiae* are concerned that any retreat from the principles of Tenth Amendment immunity established by *National League of Cities* would seriously cripple their sovereign right to structure employer-employee relationships and to determine how governmental services are to be provided to their citizens.

ISSUE TO BE COVERED IN THE BRIEF AMICI CURIAE

While the *Amici Curiae* fully support the position of San Antonio Metropolitan Transit Authority and the American Public Transit Authority on the issues originally briefed and argued during the last term of the Court, this Brief *Amici Curiae* is limited to the following question which the Supreme Court directed the parties to brief and argue in its Order of July 5, 1984:

> "Whether or not the principles of the Tenth Amendment as set forth in *National League of Cities v. Usery*, 426 U.S. 833 (1976), should be reconsidered?"

52 U.S.L.W. 3937 (U.S. S. Ct. July 5, 1984). For the reasons set forth below, the *Amici Curiae* firmly believe that *National League of Cities* was properly decided and should not, therefore, be reconsidered.

SUMMARY OF ARGUMENT

The Supreme Court's decision in *National League of Cities* is predicated upon not only the Tenth Amendment, but also the important concept of federalism which is embodied in many other provisions of the Constitution as well. As Justice Black noted in *Younger v. Harris*, 401 U.S. 37, 44 (1971), "the Framers... [envisioned] a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." Over the years, the Court has recognized the need, as the arbiter of disputes where there are clashes between federal authority and state sovereignty, to protect the right of States and their political subdivisions to a "'separate and independent existence.'" *National League of Cities*, 426 U.S. at 845. Since the right to establish minimum wages, hours, and the circumstances, if any, under which overtime will be compensated are indisputably aspects of state sovereignty, the essentials of state sovereignty would be devoured if the principles of Tenth Amendment immunity enunciated in *National League of Cities* are not retained.

As a limitation on federal commerce power legislation which directly applies to states and their political subdivisions and *not* on the authority of Congress to regulate private activities, the decision in *National League of Cities* is well within the mainstream of constitutional jurisprudence. Indeed, for a vast majority of this Nation's existence no one even suggested, let alone seriously advanced, the notion that the Federal Government could directly tell States and their political

subdivisions how to structure their employer-employee relationships in areas of integral governmental functions. For example, in *City of Newark and State, County and Municipal Workers of America, Local 277 and Board of Transportation of the City of New York and Transport Workers Union of America, et al.*, Case No. 47, (National War Labor Board, 1942), *reprinted in* C. Rhyne, *Labor Unions and Municipal Employe Law* 226 (1946), the National War Labor Board observed — at the very time that the authority of Congress to regulate private activities under the Commerce Clause was being resoundingly affirmed by the Court — that "[i]t has never been suggested that the Federal Government has the power to regulate with respect to the wages, working hours, or conditions of employment of those who are engaged in performing services for the states or their political subdivisions." *Id.* at 228.

Since *National League of Cities* was decided in 1976, the Court has clearly articulated and carefully defined the standards for reviewing Tenth Amendment claims of immunity under *National League of Cities*. These decisions have been subscribed to by a substantial majority of the Court and have been applied in numerous contexts. Since there is no need or justification to reconsider *National League of Cities*, the doctrine of *stare decisis* strongly supports the conclusion that the Court should reaffirm *National League of Cities*. To do otherwise would be to abdicate the Court's constitutional responsibility "to keep the balance between the States and the nation outside the field of legislative controversy." *New York v. United States*, 326 U.S. 572, 594 (1946) (Douglas, J., dissenting). The balance struck in favor of Tenth Amendment immunity in *National League of Cities* is, as Justice Blackmun held, "necessarily correct." 426 U.S. at 856.

ARGUMENT

I. THE HOLDING IN *NATIONAL LEAGUE OF CITIES* IS IN THE MAINSTREAM OF CONSTITUTIONAL JURISPRUDENCE.

At the outset, it should be emphasized that *National League of Cities'* principle of Tenth Amendment immunity from direct federal regulation under the Commerce Clause does not impede or intrude upon the plenary authority of Congress under the Commerce Clause to regulate private activity affecting interstate commerce. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 286, 290-91 (1981); *FERC v. Mississippi*, 456 U.S. 742, 759 (1982); *National League of Cities*, 426 U.S. 833, 840.

Nevertheless, Appellant Garcia asserts that the Court's Commerce Clause decisions upholding federal regulation of private activity are equally applicable to federal regulation of the integral governmental functions of States and their political subdivisions. This, however, was certainly not the contemporaneous understanding of the breadth of federal authority under the Commerce Clause.

The modern precedent establishing the infinite variety of private activity which is subject to federal regulation under the Commerce Clause dates from the Court's decision in *Jones & Laughlin Steel Corp. v. NLRB*, 301 U.S. 1 (1937), and perhaps reached its zenith with the Court's decision in *Wickard v. Filburn*, 317 U.S. 111 (1942). That the contemporaneous understanding of the Court's Commerce Clause decisions in cases like *Wickard v. Filburn* did *not* extend to the authority to regulate terms and conditions of the employees of States and their political subdivisions is dramatically demonstrated by the decision of the National War Labor Board in *City of Newark and State, County and Municipal Workers of America, Local 277, and Board of Transportation of the City of New York and Transport Workers Union of America, CIO, and Transport*

Workers Union of Greater New York, Local 100, CIO, Case No. 47 (1942), *reprinted in* C. Rhyne, *Labor Unions and Municipal Employe Law* 226 (1946).

In *City of Newark*, the National War Labor Board unanimously ruled that it did "not have jurisdiction over labor disputes between state governments, including political subdivisions thereof, and their public employes." *Id.* After noting that "well established doctrines in American law pertaining to the sovereign rights of state and local governments clearly exclude such disputes from the jurisdiction and powers of the Board" and that "[t]here is no doctrine more firmly established in American jurisprudence than the one that state governments and their subdivisions within the sphere of their own jurisdiction are sovereign," *id.*, the National War Labor Board, in an opinion authored by public member Wayne Morse, stated:

> It has never been suggested that the Federal Government has the power to regulate with respect to the wages, working hours, or conditions of employment of those who are engaged in performing services for the states or their political subdivisions. Any action by the National War Labor Board in attempting to regulate such matters by directive order would be beyond its powers and jurisdiction. The employes involved in the instant cases are performing services for political subdivisions of state governments. *Any directive order of the National War Labor Board which purported to regulate the wages, the working hours, or the conditions of employment of state or municipal employes would constitute a clear invasion of the sovereign rights of the political subdivisions of local state government.*

Id. at 228 (emphasis added). Among the members of the National War Labor Board joining in this *unanimous* decision were public members George W. Taylor and Frank P. Graham and Union members George Meany and Matthew Woll.

It should also be emphasized that *National League of Cities'* doctrine of Tenth Amendment immunity applies to congressional commerce power legislation: it has not been applied to legislation passed by Congress under other sections of the Constitution.[3] *See Bell v. New Jersey and Pennsylvania*, 103 S. Ct. 2187, 2197 (1983)("Requiring States to honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty"); *State of New Hampshire v. Marshall*, 616 F.2d 240 (1st Cir.), *appeal dismissed*, 449 U.S. 806 (1980)(Tenth Amendment challenge to Federal Unemployment Tax Act amendments which extended benefits to State employees was rejected where statute was enacted under spending power, not commerce power); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) ("*National League of Cities* immunity doctrine not applicable where Congress legislates under § 5 of the Fourteenth Amendment"); *City of Rome v. United States*, 446 U.S. 156, 179 (1980)(Tenth Amendment places no restriction on congressional power "to enforce the Civil War Amendments 'by appropriate legislation' ").[4]

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[3] This is not to suggest, however, that the Tenth Amendment is not relevant when considering the constitutionality of federal laws or regulations passed under other clauses of the Constitution. *See, e.g., Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948) ("If the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and the Tenth Amendments as well.").

[4] Amici do not understand the Appellees to be contesting the authority of Congress pursuant to the Spending Clause to condition the receipt of funding under the Urban Mass Transit Act of 1964 (UMTA), 49 U.S.C. §§ 1601-1618 (1976 and Supp. V 1981), upon their willingness to abide by the conditions set forth in said Act. At least one lower federal court has rejected a challenge to UMTA based on *National League of Cities*. *City of Macon v. Marshall*, 439 F. Supp. 1209, 1217 (M.D. Ga. 1977)("While Congress cannot directly command or force a state or municipality to comply with federal wage and

(Footnote continued on following page)

The Court's decision in *State of Oklahoma v. United States Civil Service Commission*, 330 U.S. 127 (1947), dramatically illustrates the difference between the limits of congressional commerce power when legislating against States qua States and when Congress exercises its authority under the Spending Clause. At issue in *State of Oklahoma* was whether federal highway funds could be withheld or other sanctions imposed if the United States Civil Service Commission determined that a member of the Oklahoma Highway Commission had engaged in impermissible political activity. The State of Oklahoma challenged the section of the Hatch Act that permitted such sanctions as unconstitutional on the ground they "invade the sovereignty of a state in such a way as to violate the Tenth Amendment . . . ." 330 U.S. at 142. The Court upheld the challenged section of the Hatch Act, stating:

> While the United States is not concerned with and has no power to regulate local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed.

330 U.S. at 143. *See also Bell v. New Jersey and Pennsylvania*, 103 S. Ct. 2187, 2197 (1983); *FERC v. Mississippi*, 102 S. Ct.

(Footnote continued from preceding page)

hour concepts, it may pursuant to the spending clause of the Constitution fix the terms and conditions upon which money from the United States Treasury will be allotted and disbursed to the States and their political subdivisions.").

To reaffirm *National League of Cities*, as Amici urge the Court to do, does not necessarily mean that Congress is precluded from enacting legislation covering the same subject matter under the Spending Clause rather than the Commerce Clause. Nor is this a distinction without a difference. Unlike the FLSA which applies directly to States and their political subdivisions without giving them any opportunity to opt out, federal legislation enacted under the Spending Clause permits States and their political subdivisions to decide whether they want to accept the conditions attached to the receipt of federal funds. *See Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

2126, 2141 (1982) ("... the Court has recognized that valid federal enactments may have an effect on state policy — and may, indeed, be designed to induce state action in areas that otherwise would be beyond Congress' regulatory authority"). Accordingly, it must be emphasized that the instant case involves the Commerce Clause, *not* the Spending Clause.

The concept of state sovereignty embodied in *National League of Cities* is predicated not only on the Tenth Amendment, but also on the structural assumption of the Constitution that the several states are to remain separate and meaningful decision-making, functioning governmental entities. *See* C. Black, *Perspectives in Constitutional Law* 40 (1963); L. Tribe, *American Constitutional Law* 241, 310 (1978). Recognition of the concept of federalism as a structural assumption of the Constitution has been recognized by the Court for many years. For example, in *Lane County v. Oregon*, 74 U.S. 71, 76 (1869), the Court stated:

> [T]he people of each State compose a State, having its own government, and endowed with the all the functions essential to separate and independent existence. ... [I]n many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized.

While the political process affords certain checks and balances, it has long been recognized that the Court has a constitutional obligation to protect the essential role of the States in our federal form of government. As Justice Douglas observed in *New York v. United States*, 326 U.S. 572, 594 (1946)(Douglas, J., dissenting):

> The notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system. ... The Constitution was designed to keep the balance between the States and the nation outside the field of legislative controversy.

Much more recently Judge Minor Wisdom observed that "Federal commerce power legislation that treats states in a

manner inconsistent with this constitutional assumption is therefore constitutionally suspect." *State of Texas v. United States*, 730 F.2d 339, 356 (5th Cir. 1984).

Significantly, an overwhelming majority of the Court has affirmed the basic conclusion of *National League of Cities* that application of the FLSA to states and their political subdivisions unmistakably interferes with an attribute of state sovereignty that is "'essential to [a] separate and independent existence.'" 426 U.S. at 845. As Justice Blackmun observed in *FERC v. Mississippi*, 102 S. Ct. 2126, 2138, "... having the power to make decisions and to set policy is what gives the State its sovereign nature." As Justice Brennan observed in *EEOC v. Wyoming*, 103 S. Ct. 1054, 1061, n.11 (1983), "... some employment decisions are so clearly connected to the execution of underlying sovereign choices that they must be assimilated into them for purposes of the Tenth Amendment."[5]

If application of the Fair Labor Standards Act to employees of States and their political subdivisions employed in integral governmental functions is not deemed to vitally affect the sovereign rights of States, it is hard to imagine what kind of federal commerce power legislation would. In this regard, it is

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[5] The establishment of the terms and conditions of employment for employees of States and their political subdivisions has never been a major concern of the Federal Government. *See Jackson Transit Authority v. Local Division 1285*, 102 S. Ct. 2202, 2207 (1982). On the other hand, there is a very substantial body of legislation enacted by the States and their political subdivisions concerning the wages, hours, and other terms and conditions of employment of their employees. *See* U.S. Dept. of Labor and U.S. Dept. of Commerce, *Labor-Management Relations in State and Local Governments: 1980* State and Local Government Special Studies No. 102 (1980). Indeed, whether or not employees should receive overtime payments has been dealt with extensively by state legislatures. *Cf. e.g.*, Minimum Wage Law, Ill. Rev. Stat. Ch. 48 § 1004a(2)(D) (1984) (state overtime provisions not applicable to employees of any governmental body) *with* Minimum Wage Law, Mich. Comp. Laws § 408.384a (1984) (state and local employees covered by State overtime provisions).

well to keep in mind the following comments of Professor Tribe:

> Of course, no one expects Congress to obliterate the States, at least in one fell swoop. If there is any danger, it lies in the tyranny of small decisions — in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell.

L. Tribe, *American Constitutional Law* 302 (1978). *See FERC v. Mississippi*, 102 S. Ct. 2126, 2145 (1982) (Powell, J., concurring in part and dissenting in part).

II. THE PRINCIPLES OF TENTH AMENDMENT IMMUNITY ENUNCIATED IN *NATIONAL LEAGUE OF CITIES* HAVE BEEN CAREFULLY ARTICULATED, WELL-DEFINED, AND CONSISTENTLY FOLLOWED IN SUBSEQUENT CASES.

While the *National League of Cities* decision consists of Justice Rehnquist's plurality opinion (joined by Chief Justice Berger and Justices Stewart and Powell) and Justice Blackmun's concurring opinion,[6] in subsequent decisions the Court has clearly articulated and well defined the standards to be used in judicially reviewing the constitutionality of congressional commerce power legislation. In *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981), the Court, in an opinion by Justice Marshall, held that a *National League of Cities* challenge to legislation enacted by Congress under the Commerce Clause must satisfy each of the following three requirements:

> First, there must be a showing that the challenged statute regulates the 'States as States.' ... Second, the federal regulation must address matters that are indisputably 'attribute[s] of state sovereignty.' ... And, third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.'

452 U.S. at 288. In addition, the court in *Hodel* noted that even if these three requirements are met, "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies state submission." 452 U.S. at 288, n.29. This latter consideration effectively assimilates into the standards for reviewing Tenth Amendment claims under *National League of Cities* the "balancing approach" mentioned by Justice Blackmun in his concurring opinion in *National League of Cities*. *National League of Cities*, 426 U.S. at 856. *See FERC v. Mississippi*, 102 S. Ct. 2126, 2139, n.28 (1982)(opinion by Justice Blackmun).[7]

These standards have been consistently used by the Court in evaluating Tenth Amendment immunity claims based on *National League of Cities*. *See e.g., United Transportation Union v. Long Island Railroad Co.*, 102 S. Ct. 1349, 1353 (1982); *FERC v. Mississippi*, 102 S. Ct. 2126, 2139, n.28 (1982); *EEOC v. Wyoming*, 103 S. Ct. 1054, 1060-61 (1983). Moreover, and significantly, these standards for reviewing *National League of Cities* claims have been subscribed to by a substantial majority of the Court. Indeed, two of the four dissenting justices in *National League of Cities* have authored opinions utilizing the aforementioned standards. *EEOC v. Wyoming*, 103 S. Ct. at 1060-61 (opinion by Justice Brennan);

[6] The principle of Tenth Amendment immunity articulated in *National League of Cities* was clearly presaged by the Court's earlier decision in *Fry v. United States*, 421 U.S. 542 (1975), in which Justice Marshall, on behalf of the Court, stated that the Tenth Amendment "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Id.* at 547, n.7.

[7] In fact, in his opinion on behalf of the Court in *Reeves, Inc., v. Stake*, 447 U.S. 429, 438, n.10 (1980), Justice Blackmun quoted with approval from Justice Rehnquist's opinion in *National League of Cities*. Citing *National League of Cities*, Justice Blackmun in *Reeves* stated that "[c]onsiderations of sovereignty independently dictate that market-place actions involving 'integral operations in areas of traditional governmental functions' — such as the employment of certain state workers — may not be subject even to congressional regulation pursuant to the commerce power." *Id.*

Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. at 288 (opinion by Justice Marshall).[8]

Given the careful delineation of the standards governing review of Tenth Amendment claims based on *National League of Cities* and the repeated utilization of these standards in numerous decisions over the past few years,[9] the Amici respectfully submit that there is absolutely no need to reconsider the decision in *National League of Cities.* To the contrary, it should once again be reaffirmed as it was, *inter alia,* in *United Transportation Union v. Long Island Railroad Co.*, 102 S. Ct. 1349 (1982); *EEOC v. Wyoming,* 103 S. Ct. 1054 (1983); and *FERC v. Mississippi,* 102 S. Ct. 2126, 2142, n.32 (1982).

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[8] Indeed, even Justice Stevens joined without comment the Court's opinions in *United Transportation Union v. Long Island Railroad Co., supra,* and *FERC v. Mississippi, supra,* in which the Court analyzed and resolved Tenth Amendment claims based on *National League of Cities* in accordance with these standards. In fact, in *South Carolina v. Regan,* 104 S. Ct. 1107, 1136, n.18 (1984), Justice Stevens in his concurring opinion used these standards in rejecting a Tenth Amendment claim based on *National League of Cities.*

[9] This is not to deny that, even with carefully articulated and well-defined standards for reviewing claims based on *National League of Cities,* the various Justices might reach different results albeit applying the same standards. *See, e.g., EEOC v. Wyoming,* 103 S. Ct. 1054 (1983). There are, of course, numerous other examples where the Court has split in its application of the same constitutional standard to a given set of facts.

III. IMPOSITION OF THE MINIMUM WAGE AND OVERTIME PROVISIONS OF THE FLSA AT THIS LATE DATE WOULD STILL HAVE A DEVASTATING IMPACT ON STATES AND THEIR POLITICAL SUBDIVISIONS.

In *National League of Cities,* Justice Rehnquist identified a number of evils that would be inherent if States and their political subdivisions were required to apply the FLSA to employees providing integral governmental services:

> —It would result in a "forced relinquishment of important governmental activities . . . ." 426 U.S. at 847.
>
> —It would displace "state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require." 426 U.S. at 847.
>
> —It would directly penalize "the States for choosing to hire governmental employees on terms different from those which Congress has sought to impose" and would result in a "congressionally imposed displacement of state decisions [which] may substantially restructure traditional ways in which the local governments have arranged their affairs." 426 U.S. at 849.

With respect to the latter item, Justice Rehnquist noted that application of the FLSA to employees of States and local governments would likely "have the effect of coercing the States to structure work periods in some employment areas, such as police and fire protection, in a manner substantially different from practices which have long been commonly accepted among local governments of this Nation." 426 U.S. at 850. He also referred to the likely impact which the FLSA would have on the practice of providing compensatory time off rather than cash compensation for overtime worked.

The foregoing impacts which Justice Rehnquist identified are even more valid today than they were when he wrote his opinion in 1976. Take, for example, application of the FLSA's overtime requirements to employees of state and local govern-

ments. The most recent survey data concerning the hours of work for firefighters employed by units of local government shows that:

> Firefighters work an average of 52 hours . . ., with great variation in the practices reported by cities. Median and third quartile figures equal 56 hours per week, indicating that firefighters in the largest of cities reporting average 56-hour work weeks.

International City Management Association, *The Municipal Yearbook 1984* 145 (1984). Most jurisdictions also continue to have compensatory time off policies, *i.e.*, when an employee works beyond his/her normal work week, he/she is granted time off without loss of pay at some future time in lieu of receiving cash compensation for the overtime worked. *See, e.g.*, R. Pruim, *A Study of State Government Employee Benefits* 27-29 (1983); E. Dickson & G. Peterson, *Public Employee Compensation: A Twelve City Comparison* 64-65 (Los Angeles), 116 (Detroit), 127 (Houston), 201 (San Francisco) (2d ed. 1981); and NPELRA members and members of its various state affiliates (who assist in the formulation of wage and benefit policies and are responsible for negotiating collective bargaining agreements at state and local levels) also report that the use of compensatory time is exceedingly common among public employers.

That the impact of applying the FLSA to States and their political subdivisions would be as great, if not greater, today than it would have been in 1976 can be inferred also from the impact on the City of Eugene, Oregon, one of the Amici herein. The normal work week specified in the City's most recent collective bargaining agreement with the International Association of Firefighters for fire suppression and ambulance person-

[10] *See* International City Management Association, *The Municipal Yearbook 1984* 151-92 (1984), for comprehensive survey data setting forth the duty hours per week for police, fire, and refuse collection and disposal employees employed by the more than 1,300 communities with populations ranging from 10,000 to over 1,000,000. These statistics demonstrate that a substantial number of communities continue to employ firefighters for a duty week which is substantially in excess of 40 hours.

nel is 56 hours.[10] The City estimates that the cost to pay these employees time and one-half for all hours in excess of 40 per week would be over $600,000! Application of the FLSA to the City of Eugene's employees would, as Justice Rehnquist said in *National League of Cities*, directly penalize the City "for choosing to hire governmental employees on terms different from those which Congress has sought to impose" and would undoubtedly result in a substantial restructuring of the "traditional ways in which the [City of Eugene, Oregon has] arranged [its] affairs." 426 U.S. at 849.

IV THE DOCTRINE OF *STARE DECISIS* STRONGLY SUPPORTS REAFFIRMING THE PRINCIPLES OF TENTH AMENDMENT IMMUNITY ENUNCIATED IN *NATIONAL LEAGUE OF CITIES*.

While the doctrine of *stare decisis* does not require that constitutional pronouncements must stand for all time, it does strongly counsel that constitutional pronouncements by the Court, and especially recent constitutional pronouncements by the Court, should not be lightly cast aside. As this Court recently stated in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481, 2487 (1983), in reaffirming *Roe v. Wade*, 410 U.S. 113 (1973):

> . . . the doctrine of *stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law.

As in *City of Akron*, " [t]here are especially compelling reasons for adhering to *stare decisis* in applying the principles of [*National League of Cities*]." 103 S. Ct. at 2487, n.1. As was the case in *Roe v. Wade*, *National League of Cities* "was considered with special care. It was first argued during the [1974] Term, and reargued — with extensive briefing — the following Term." *Id.* And, as has been the case with *Roe v. Wade*, ". . . the Court repeatedly and consistently has accepted and applied the basic principle" of Tenth Amendment immu-

nity set forth in *National League of Cities* in subsequent decisions. *See Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981); *United Transportation Union v. Long Island Railroad Co.*, 102 S. Ct. 1349 (1982); *FERC v. Mississippi*, 102 S. Ct. 2126 (1982); *EEOC v. Wyoming*, 103 S. Ct. 1054 (1983). As in *City of Akron*, it is respectfully submitted that the Court should "respect it [*i.e.*, the doctrine of *stare decisis*] and reaffirm [*National League of Cities*]." *City of Akron*, 103 S. Ct. at 2487.

There is one additional fact which strongly supports application of the doctrine of *stare decisis* in the instant case. Since the Court's decision in *National League of Cities*, States and their political subdivisions have structured employer-employee relationships with respect to minimum wages, hours, overtime, and compensatory time off practices based on their understanding that they were under no obligation to comply with the dictates of the Fair Labor Standards Act.

There can be no doubt but that the manner in which States and their political subdivisions have recently established or re-established terms and conditions of employment for their employees, especially with respect to hours of work, overtime, and compensatory time off provisions, is directly contrary to what would be mandated if the Fair Labor Standards Act were applicable to them. As set forth above, the average work week for firefighters, whether established by collective bargaining agreement or otherwise, is now in excess of 50 hours and in many, if not most, communities is 56 hours. Moreover, most State and local public employers have recently adopted or reaffirmed policies, whether through collective bargaining or otherwise, of compensating employees who work beyond their normal work week by granting them time off at a later date without loss of pay (*i.e.*, compensatory time off or "comp time," as it is commonly known in the public sector, in lieu of receiving direct overtime wage payments).

To overrule *National League of Cities* and hold that the mandatory provisions of the Fair Labor Standards Act are

directly applicable to State and local employers would fly directly in the face of their settled expectations based on *National League of Cities* and subsequent decisions which have reaffirmed and institutionalized its holding. *See Patsy v. Board of Regents of the State of Florida*, 102 S. Ct. 2557, 2560, n.3 (1982) ("... whether overruling [prior] decisions would frustrate legitimate reliance on their holdings" must be taken into account). It would vitiate important provisions in hundreds of bargaining contracts covering thousands of public employees. The impact of such a decision—economic and otherwise—cannot be overemphasized.

CONCLUSION

The right of the States and their political subdivisions to establish the terms and conditions of employment of their employees employed in integral governmental functions, including their wages, hours, and provisions governing overtime compensation, if any, is indisputably among the sovereign rights which may not be directly regulated by the Federal Government under the Commerce Clause. This principle — implicit in *Fry v. United States* — was made explicit in *National League of Cities* and has been repeatedly reaffirmed by the Court in the past four years. No reasoned justification has been presented — indeed, none exists — for reconsideration of the principles of Tenth Amendment immunity set forth in *National League of Cities*. The decision was then, and is now, "necessarily correct." 426 U.S. at 856 (Blackmun, J., concurring). Accordingly, *Amici* respectfully request this Court to affirm the judgment of the District Court in the instant case and, in doing so, reaffirm *National League of Cities*.

Respectfully submitted,

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